***UNITED STATES DISTRICT COURT***

***DISTRICT OF MAINE***

| | | |
|---|---|---|
| ***DENNIS M. SNYDER,*** | ***)*** | |
| | ***)*** | |
| ***Plaintiff*** | ***)*** | |
| | ***)*** | |
| ***v.*** | ***)*** | ***Civil No. 94-388-P-H*** |
| | ***)*** | |
| ***STATE OF MAINE, et al.,*** | ***)*** | |
| | ***)*** | |
| ***Defendants*** | ***)*** | |

***RECOMMENDED DECISION ON DEFENDANTS' MOTION TO DISMISS***

Appearing *pro se,* the plaintiff contends that he has been unconstitutionally deprived of his parental rights as the result of a state court divorce proceeding in which the court found, by a preponderance of the evidence, that prohibiting all contact between the plaintiff and the child is in the child's best interest. The defendants, which are the State of Maine and its former attorney general, Michael E. Carpenter, have filed a motion to dismiss for failure to state a valid claim. Their position is that the plaintiff is seeking to use the federal courts to mount an improper collateral attack on the divorce proceedings, and that plaintiff is incorrect in seeking to extend the "clear and convincing evidence" standard, applicable to the termination of parental rights pursuant to *Santosky v. Kramer*, 455 U.S. 745 (1982), to a proceeding in which the state was not a party and the termination of parental rights was not at issue. For the reasons that follow, I recommend that the court dismiss the action for want of subject matter jurisdiction.

At issue in this proceeding is 19 M.R.S.A. § 752, which requires Maine state courts in

divorce proceedings to "award allocated parental rights and responsibilities, shared parental rights and responsibilities or sole parental rights and responsibilities, according to the best interest of the child." *Id*. at subsection 6. Although the Supreme Court has declared that a state seeking to terminate all rights of a mother or a father in a child must make its case by clear and convincing evidence, *see Santosky*, 455 U.S. at 769, the Law Court has ruled that the determination of parental rights and responsibilities in a divorce proceeding pursuant to section 752 and its predecessor statute requires proof only by a preponderance of the evidence, *see Jacobs v. Jacobs*, 507 A.2d 596, 598-600 (Me. 1986). The crux of the plaintiff's complaint is that the *Jacobs* rule is violative of the federal constitution, either generally or at least as it was applied to him, because the amended divorce decree has deprived him of all contact with his minor child.

The Federal Rules of Civil Procedure require the court to dismiss an action "whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter." Fed. R. Civ. P. 12(h)(3). In his complaint, the plaintiff asserts two bases for this court's subject matter jurisdiction: 28 U.S.C. § 2201 and 28 U.S.C. § 1331. Section 2201, the Declaratory Judgment Act, is a procedural mechanism that does not extend the jurisdiction of the federal courts. *Colonial Penn Group, Inc. v Colonial Deposit Co*., 834 F.2d 229, 232 (1st Cir. 1987). Section 1331 simply provides that "[t]he district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." As with section 2201, section 1331 creates no federal rights but merely authorizes the district courts to exercise jurisdiction when a federal question is otherwise at issue. *Ellis v. Cassidy*, 625 F.2d 227, 229 (9th Cir. 1980); *Lyle v. Village of Golden Valley*, 310 F. Supp. 852, 855 (D. Minn. 1970). It is a bedrock principle of federal law that "lower federal courts possess no power whatever to sit in direct review of state court

decisions." *Atlantic Coast Line R.R. v. Brotherhood of Locomotive Eng'rs*, 398 U.S. 281, 296 (1970); *Hanna v. Home Ins. Co.*, 281 F.2d 298, 303 (5th Cir. 1960), *cert. denied*, 365 U.S. 838 (1961); *see also Silva v. Silva*, 680 F. Supp. 1479, 1481-82 (D.Colo. 1988) (plaintiff may not use federal court for collateral attack of divorce decree). The defendants make much the same point in arguing that the court should dismiss the complaint for failure to state a valid claim.

In reviewing the allegations in a *pro se* complaint, the court holds the *pro se* litigant to a less stringent standard than that which would be applied to a formal pleading drafted by a lawyer. *Haines v. Kerner*, 404 U.S. 519, 520 (1972); *see also Slotnick v. Garfinkle*, 632 F.2d 163, 165 (1st Cir. 1980) (*pro se* complaints to be read "generously"). But this liberal pleading standard applies only to a plaintiff's factual allegations. *Neitzke v. Williams*, 490 U.S. 319, 330-31 n.9 (1989). Thus, the court is unable to construe, repackage or otherwise bend the words in the plaintiff's complaint in a manner that would confer federal question jurisdiction over his complaint. If such a metamorphosis were possible, the obvious choice would be 42 U.S.C. § 1983, which creates a federal cause of action for the kind of constitutional violation alleged by the plaintiff, but only against a person who acts under color of state law. I note that the plaintiff is familiar with section 1983, having previously invoked it before this court in an earlier and unsuccessful attempt to challenge a state court custody determination via a lawsuit naming the state attorney general as the defendant. *See Snyder v. Carpenter*, Docket No. 91-205-P (D. Me. Sept. 19, 1991).

Neither a state, nor a state official acting in his or her official capacity, is a "person" within the meaning of section 1983. *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 71 (1989). And, as the defendants note, the complaint is devoid of any suggestion whatsoever that former attorney general Carpenter took part in the events at issue, acting in either an official or personal capacity.

Thus, even a wizardly transformation of the plaintiff's complaint into a section 1983 action would be an exercise in futility.

The instant proceeding apparently represents half of a two-pronged collateral assault by the plaintiff on the amended divorce decree obtained by his ex-wife. The Law Court has recently rejected his effort to gain access to his minor son by seeking a writ of habeas corpus pursuant to state law. *See Snyder v. Talbot*, 1995 WL 12571 (Me., Jan. 11, 1995). His attempt to wage this struggle on a federal front must also fail, because this court is without jurisdiction to entertain such a collateral attack on the state court's determination of the plaintiff's right to contact with his minor child. Accordingly, I recommend that the complaint be **DISMISSED** *sua sponte* on that ground.

***NOTICE***

***A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.***

***Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.***

***Dated at Portland, Maine this 20th day of January, 1995.***

_____

***David M. Cohen***
***United States Magistrate Judge***